ART. IX.—*Reports of Cases Argued and Determined in the Circuit Court of the United States, for the Second Circuit, comprising the Districts of New-York, Connecticut, and Vermont.* By ELIJAH PAINE, Jun., Counsellor at Law. Vol. I. 8vo. pp. 718. New York, 1827.

IN the course of the following article we intend to speak at some length on the importance of promptly reporting adjudicated cases, particularly those settled in the United States courts; of the nature and necessity of the common law, and the only sure means of improving it; of the impossibility of codifying it completely in any of our free legislative assemblies, and the utter inutility of such a measure, even were it easily practicable. At the close of the piece we shall make a few remarks on the volume before us, and on the character of the eminent judges, whose adjudications compose it. We have chosen to lay out our ground thus distinctly before our readers, in order that they may know perfectly well what to depend upon, before they begin. To many of them, no doubt far the greater portion of our theme will be uninteresting, although we ourselves think it of the highest importance. Hitherto we have thought it so much so, that in order to give free play to an inquiry into the merits of the common law, we have admitted into our journal articles upon the subject from the opposite parties in the controversy, and therefore, as it would at first sight appear, wholly irreconcilable with each other. It is of great consequence, we say, that the leading questions in this dispute should by this time be definitively settled. If the common law be of the vicious character, of which some have represented it to be, it should as soon as possible be removed, closely interwoven as it is, with all our political institutions. If, on the contrary, it be an excellent system in itself and admirably suited to our growing wants and changing circumstances, we ought to feel assured of it, that we may live contented under its administration, and do all in our power to give it security and improvement. This is the state of the case, as it appears to us at present. Measures are proposed for the removal of an evil, which does not exist; if it do exist, it is unavoidable; if it be not unavoidable, still the measures proposed never will remove it; and even if they could remove it, when promptly and efficiently carried into execution, in this country at least we venture to say they are wholly impracticable.

Since we last published an article upon this subject, we have the opinion of one of those venerable sages of the profession, who, uniting the noblest talents and the most extensive learning, with the greatest experience, both at the bar and upon the bench of one of the highest courts of judicature in our country, cannot be regarded with too much respect. We should be almost willing to cite such an one, as conclusive authority upon a question, which he is so perfectly competent to settle. Our readers understand us, of course, as alluding to the profound and eloquent Commentator on American Law. We will lay his opinion before them.

'In its improved condition in England, and especially in its improved and varied condition in this country, under the benign influence of an expanded commerce, of enlightened justice, of republican principles, and of sound philosophy, the common law has become a code of matured ethics, and enlarged civil wisdom, admirably adapted to promote and secure the freedom and happiness of social life. It has proved to be a system replete with vigorous and healthy principles, eminently conducive to the growth of civil liberty.'—*Kent's Commentaries*, vol. I. pp. 321, 322.

'A great proportion of the rules and maxims which constitute the immense code of the common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice, and of cultivated reason, to particular cases. In the just language of Sir Matthew Hale, the common law of England is "not the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation, of many ages of wise and observing men." *And his further remarks on this subject would be well worthy the consideration of those bold projectors, who can think of striking off a perfect code of law at a single essay.'—Ibid.* pp. 439, 440.

In all ages and nations there must be common law, or *leges non scriptæ*. And in exact proportion, too, as those are advanced in civilization and refinement, do these become numercus, extensive, and intricate. It was so among the Greeks. It was so also among the Romans.* We know how it is in Eng-

* 'Constat autem jus nostrum, quo utimur, aut scripto, aut sine scripto; ut apud Græcos, τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι.' *Inst. lib.* 1, *tit.* 2, § 3. 'Sine scripto jus venit, quod usus approbavit; nam diuturni mores, consensu utentium comprobati, legem imitantur.' *Ibid.* § 9. 'Et non ineleganter in duas species jus civile distributum esse videtur.' *Ibid.* § 10. Aristotle also makes precisely the same distinction. *Rhet. lib.* 1, *cap.* 10. *Rhet. ad Alex. cap.* 1.

land. It is more or less so in fact, all over the civilized world. It is the case even in France, and is rapidly becoming more so, as we understand, and as every rational man might have fairly expected, under the admirably digested code of Napoleon.* It is so, in short, from the uncompromising nature of things. It lies not in human foresight to anticipate even the various classes of cases that may arise. What legislature, for example, could have previously provided for the great questions that have presented themselves under policies of insurance, or bills of exchange, or promissory notes, or the admissibility of evidence, or the taking of testimony, or in short under any branch or department of law? for to attempt to enumerate them is to limit ourselves, and to confess that they may be enumerated, when they are in fact innumerable. New and unimagined cases will for ever come up, for which no legislative provision could have been made. What then is to be done? There cannot be a great and grievous wrong, without a violation of law. The questions therefore cannot be laid aside; and by what laws must they be settled? By the *leges non scriptæ*, by analogies drawn from previously adjudicated cases, by well established usages and customs, existing among intelligent and experienced people, and arising from, and therefore adapted to their wants, and to circumstances in which they have been placed, and finally ratified by the sanction of the courts of judicature. It is this in fact which forms the first and perhaps the only true foundation of the common law. And without the liberty of judicially resorting to it, we should be in a state infinitely worse than despotism; a state where there are innumerable and continually multiplying violations of right, for which, however, there can be neither redress nor remedy.

We may hold it therefore for an incontrovertible truth, that there must be a common or unwritten law in every civilized state. If it be an evil, it is a necessary evil. No human ingenuity can prevent it. The only question then remaining is, how we can ensure to it correct principles, and give it all the accuracy of which it is susceptible. And we shall give our reasons, in the course of this article, for believing that this can

* Still this code, with all its excellencies, has many defects. It provides no legal remedies. It says nothing of the various forms of action; of pleas or pleadings; of the law of evidence, or of the testimony of witnesses, &c. And it is from some of these sources, that the greatest embarrassments have arisen in settling our common law.

only be done by publishing promptly and faithfully able reports of important decisions, and by applying to the legislature for aid when the evil is of a nature to require correction.

There seems to be something contradictory in the arguments, as they are usually urged, against the character of the common law. By one, the judge is called a legislator, moulding his decisions to suit his own notions of equity and right. By another, he is thought to be so absolutely bound down to precedent and authority, that he dares not depart from them, however unreasonable they may appear to him to be. To our apprehension neither of these statements is in any degree correct. In fact, they neutralize each other.

The legislator is free. No decree from a higher authority, except it be the letter and the spirit of the Constitution, has any restrictive force over his measures. Far different from this, however, with the judge upon the bench. In the capacity of legislator, he has authority to act only so far as is necessary in order to carry some law into execution, and then he is within the narrowest limits, and strictly and ably watched. In clearly settled cases, he is indeed bound to acquiesce ; not because they were arbitrarily or peremptorily decreed, but because, as has been often observed, the points of the question in controversy were thoroughly examined by the keenest minds in competition with each other ; and then deliberately pronounced to be law by cool and impartial judges ; and because the principles of justice, which regulate the rights of one man, ought not to be refused to another. When the original cases were evidently not well examined in the outset, they may be reëxamined, and overruled, and set aside ; and this is the condition, which is always annexed to them in practice. But when they were so examined, there is every reason for giving them the obligatory force of law. We should feel the greatest insecurity of property and of rights, were it otherwise ; to say nothing of the time and labor uselessly spent in searching for what had already been well ascertained.

It would be with us no ground of fear, were our judiciaries actually invested with legislative powers, far more extensive than any that they have been accused of arrogating to themselves. Judges, sharply and unremittingly watched from every side of the question in controversy, by the shrewdest and most intelligent men in the community, whom education and the warmest feelings of pride, ambition, self-interest, and rivalry

of excelling in the discharge of their professional duties, combine to make acute in the detection of errors, and bold and active in publicly exposing them, will not venture, intentionally, to go very far astray from the plain principles of rectitude. They are as strongly protected, too, from unintentional wrongs. It is from the same well guarded and unexceptionable sources, that they are compelled to receive all possible light and instruction. In such a body of men, and thus situated, we should not be afraid to repose absolute legislative power, so far, at least, as is necessary to regulate the common transactions between man and man. And when we see the time and money which are now miserably wasted by many of our legislatures in making bad laws, to say nothing of the faction and the views of self-interest which reign in them, and the poor principles of qualification on which some of their members are elected, we almost wish that it were so. It is perhaps the *ultima Thule* in the career of political improvement.

In general, however, we believe that the writers against the common law have now given up what was formerly the most important point in the controversy. They concede that it contains some of the most admirable principles in any system or code; and the object seems to be merely to select these, and purify them from the dross, with which they say they are mingled, and then give them the sanction of some direct act from the legislature. These arguments appear to be directed against a few of its slight errors, and, in the formal part of it, against some prevailing absurdities, which its warmest admirers are now willing to allow to be such. They are errors; they are absurdities. They have brought the whole system into disrepute among the truest, and in some instances the most enlightened friends of equity and right; and although not materially, in the end, affecting the prompt and efficient administration of justice, they may be, and no doubt in some cases ought to be corrected. It is not the business of the judiciary, however, to undertake this. With all their legislative powers, which are so much complained of, and how much soever themselves may desire the reformation, they will not, they dare not attempt it. The legislatures of every state in the union come together once or twice in a year, with this as one of the principal objects of their convening; and when the evil is so great as to cry aloud for a remedy, there is no doubt that an adequate one may be applied. Let us have a care, however, lest we undermine and make the whole venerable

fabric tremble, merely for the purpose of removing some of the unimportant outworks, which time and a change of circumstances may have rendered awkward and uncouth.

The only question, indeed, now actually at issue between the writers upon this subject, we believe to be this. Is it expedient for us to undertake to analyze the whole of the common law, select the most valuable of its principles, digest them, arrange them, embody them into a code, give them the sanction of some direct legislative act, and by the same act declare all the residue to be void or of no legal validity? We say we understand this to embrace the only important points of inquiry still unsettled among the parties in this controversy; and for ourselves, we confess we have no confidence in the practicability of the proposed measure, even were it ever so desirable. The business of fully codifying all the existing laws, we believe, never could be accomplished by one of our free legislatures. We feel almost assured of this, in fact, by actual observation. How slowly and how unwillingly do they alter any of the material principles of judicial proceeding, even when this is strongly recommended to them, and by the most enlightened men. At every period of their coming together, propositions for this end are continually brought before them, which they as continually reject. The old Norman barons used to say, when in parliament assembled, *Nolumus leges Angliæ mutare.* And it is still the practical maxim of our free legislative bodies. Suppose, then, they were called upon to go over the whole ground, investigate the complicated details of this most intricate and extensive and rapidly growing of all the sciences, take up title after title, rule after rule, principle after principle, examine them and the reasons on which they are founded, and the various modes by which they are to be carried into execution, and their influence on the general administration of justice in the community,—we know not when they would find the end of it. And all this they must sooner or later perform; for although the business of analyzing and codifying may at first be entrusted to a few enlightened men, the task of revising and correcting, as well as enacting into law, must be done by the legislatures themselves; or they delegate the highest trust committed to them to subordinate agents, without themselves seeing to its faithful execution. At least, under this impression they uniformly act. They think it their duty to place implicit confidence in no one. We can imagine the innumerable alterations, amend-

ments, and substitutions, which almost every member thinks himself capable of introducing, and bound, perhaps, to insist upon; and it needs but little experience to convince us of the wearing delays and disaffections that must arise from this mode of proceeding. We venture to say, in short, that the undertaking never could be satisfactorily accomplished by our free legislative assemblies We know that it was never so attempted.

It is not in lands of liberty and equal rights that the business of codifying flourishes. It is commonly the work of despots. A single imperial voice, commanding unqualified instant submission throughout the community, has hitherto ordered, directed, and enforced it in practice. In this manner only can it be promptly, harmoniously, and efficiently done; and although the laws which were thus framed are of a very admirable character, and still call forth the highest commendations of the wise, it is not because the people were free for whom they were designed, but because they were not free, and had neither the power nor the presumption to attempt to alter those, that were imposed upon them by the sovereign authority; which, however, fortunately for them, had the wisdom to select and employ the most enlightened counsel in the work. If our political institutions had prevailed among them, they would not have had, they would not have needed, the statutory codes. The evils which called forth these important remedies, are of a kind of which we, in this country, can form no adequate conception; and yet they ought to be taken into the estimate, when we speak of the necessity or the utility of their so much lauded legal system.

Justinian was the sole legislator of the whole Roman empire. The first principle of his code was, *Quod principi placuit, legis habet vigorem.* For four centuries before him, in fact, such had been the constant and undisputed right of those clothed with the imperial power. The will of a single man, of a child, perhaps, as has been justly said, was allowed to prevail over the wisdom of ages, and the inclinations of millions; and few institutions, either human or divine, were permitted to stand on their old foundations. Yet during this very period, were enacted by those various single-handed legislators, the perpetual edict of Hadrian, the Gregorian, the Hermogenian, and the Theodosian Codes; the Code, the Pandects, and the Institutes of Justinian; immense and admirably digested systems of laws, of which those

now remaining have nothing like a rival among the similar juridical efforts of modern times, aided as these have been by lights borrowed from those. The evils existing then, as we have said, were of a nature to make such a remedy indispensably necessary. The constitutions of the emperors were often irreconcilable, and sometimes contradictory. The ordinances, edicts, responses, rescripts, novels, and we know not what other classifications of laws, were inconsistent with each other, and no ingenuity could harmonize them. Many parts had never any force in practice; many had become obsolete; and the whole body of those actually in operation was full of obscurity and wholly destitute of order. 'In the space of ten centuries,' says Gibbon, 'the infinite variety of laws and legal opinions had filled many thousand volumes, which no fortune could purchase, and no capacity could digest. Books could not easily be found, and the judges, poor in the midst of riches, were reduced to the exercise of their illiterate discretion.'

These are the evils which the statutory digests of Justinian were originally designed to remove. A few of a similar character, and others of a totally different one, existed in France; and nearly the same imperial legislative power, though remotely and indirectly applied, was necessary to carry the code of Napoleon into execution. That beautiful country had been long divided into very many provinces or departments, in which various opposite regulations of law prevailed. In one, for example, the inheritance of personal property *(succession mobilière)* went on principles of descent different from those in another. In one, it would go to the father; in another, to the uncle; in a third, to the husband or wife, in preference to the other two. This was a very fruitful source of artifice and strife. The parent, or curator, or tutor, sometimes removed, with the ward under his protection, to a distant part of the realm, merely for the purpose of giving his own family a better chance in the inheritance. It was in order to remedy difficulties similar to these, and make the law consistent and uniform all over France, that the code of which we are speaking was chiefly designed; and we believe that this is the only great practical benefit which has hitherto been derived from it. For the reasonings in support of its principles contain little that is new, and the principles themselves are almost all borrowed from the civil law, which was in the main the common law of France before the revolution, and, if we are not mistaken, it continues to be so now.

But in our own country we have no such evils to remedy, and no such legislative power therefore is necessary for their removal. We have said, that we do not believe in the practicability of codifying here, even were it ever so expedient; and we now say that we do not believe in the expediency or necessity of it, even were it ever so easily practicable. The good principles of the common law will have their full force and ascendency in our courts of judicature, without their being especially directed to it by the authority of the legislatures, in consequence of a code which they have seen fit to sanction. And we have a plain way of removing the bad ones, when they are proved to be such, and the evil calls distinctly for a remedy.

The sole avowed object of codifying is to give certainty and simplicity and consistency to the law. But we know that it can never in this way be accomplished, even with the greatest power, genius, and facilities, for carrying it into effect. The various and growing wants and occasions of the law, no human prescience can anticipate. We can approach the nearest to that highly desirable end, which codifiers so earnestly seek for in vain, by publishing promptly and regularly faithful reports of fully investigated cases. Submit them fairly to public examination, and the false principles will soon be laid aside, and the truly valuable ones have the full force of law without the sanction of a code. It is impossible for us to over-estimate (we cannot repeat it too often) the importance of doing this. A remarkable proof of the absolute necessity of it, occurred to us on reading the volume now on our table. It was under a case, too, arising on the promulgation of laws. We do not know that we can do better than bring it before our readers, partly for the purpose of supporting what we have stated, and partly as a slight sample of the interesting character of the Reports, here presented to us by Mr Paine. For we think we can see in this, and the other written opinions of Judge Livingston, the pen of a fine scholar and man of taste, and the marks of a bold and elevated, though sometimes erring mind. The facts in the case alluded to are briefly these.

The act laying an embargo on the ports of the United States, was passed on December 22, 1807. On the ninth of the following January, the supplemental act received the signature of the president. A vessel sailed from the port of St Mary's, in Georgia, on the fifteenth of the same month, and was afterwards seized by a collector for a violation of the law. The official

intelligence of these acts did not reach St Mary's until the evening of the fifteenth, and was not publicly announced until the next day, although various rumors about them had been in circulation for some time before. The only question was, whether there was such a promulgation of the laws as to give them the force of a statute, and thus work the condemnation of the vessel. Judge Livingston decided that there was not. The vessel was accordingly restored. The following are some of his remarks.

'But whether a law thus worded be in force throughout the United States on the day of its passage, or not until after a reasonable time for promulgation of it in the different parts of the union, is a question purely of judicial cognizance, and may be decided without interfering with any other department of government; and this again resolves itself into the simple question, whether in a case like this any promulgation is necessary.

'A more abject state of slavery cannot easily be conceived, than that the legislature should have the power of passing laws inflicting the highest penalties, without taking any measure to make them known to those whose property or lives may be affected by them. It is not only necessary, therefore, in a country governed by laws, that they be passed by the supreme or legislative power, but that they be notified to the people who are expected to obey them. The manner in which this is done may vary; but whatever mode is adopted, it should be such as to afford a reasonable opportunity to every person who is to be affected by them, of being as early as possible acquainted with them. "Whatever way is made use of, it is incumbent on the promulgators," says the learned commentor on the laws of England, "to do it in the most public and perspicuous manner." The court will not stop to inquire in what manner the laws of congress, relating to different subjects, should be promulgated, or whether a mere deposite of them in the proper office, after a reasonable lapse of time, would not amount to a sufficient notification. But as it regards laws of trade, which is the case before it, rendering penal acts, although sanctioned by former laws, and done in concurrence and with the consent of its own officers, the court thinks it cannot greatly err in saying, that such laws should begin to operate in the different districts only from the times they are respectively received, from the proper department, by the collector of the customs, unless notice of them be brought home in some other way to the person charged with their violation. A proposition so reasonable, and so consonant to those principles of justice and humanity which are unchangeable, requires only to be stated to receive our universal assent. That a law which passes at Washington should subject to forfeiture every vessel which sailed from the United States on the very day of its passage, or the day after,

however remote the port of departure, and after a regular clearance by the authorized agent of government, is a doctrine leading to such unjust and tyrannical consequences, that nothing but a course of decisions, whose meaning admitted of no doubt, could induce this court to sanction it. There may be a difference in name, but there is none in reality, between an *ex post facto* law, which Congress cannot pass, and one whose operation is to be so universal and instantaneous. The position that the law intends every person to have notice of what is done in parliament, as soon as it is concluded, because the whole realm is there represented, is too quaint to require refutation. Indeed, the same learned writer, who would very gravely persuade us that a merchant in Boston, at the distance of five hundred miles, must know every law of Congress the moment it is passed, merely because he may have had a voice in the choice of a few representatives, who may all have voted against it, as if not satisfied with his own reasoning, and feeling, no doubt, the propriety of affording to the subject some other and better means of information, tells us, that he had found upon examination, that not long after the art of printing had found its way into England, which was between three and four hundred years ago, the practice had been to publish acts of parliament in the counties, to the end "that the subjects might have express notice thereof, and not be overtaken by an intendment in law."' pp. 26—28.

Yet on the same statutes, under exactly the same material facts, and with some circumstances even more favorable to the ship-owners, Judge Story has decided the other way.

'Since the adoption of the constitution of the United States, which prohibits the passing of *ex post facto* laws, it seems to be considered, that statutes take effect immediately from the time of their date or passage, and not before; in the same manner as they now do in England. But we shall hardly find a case, in which the promulgation of them has been held necessary, to give them operation. So early as the 39 *Edw. III.*, this precise objection was taken; and *Sir Robert Thorpe*, then Chief Justice, answered, "although proclamation be not made in the county, every one is bound to take notice of that which is done in parliament; for as soon as the parliament hath concluded anything, the law intends that every person hath notice thereof, for the parliament represents the body of the whole realm, and therefore it is not requisite that any proclamation be made, *seeing the statute took effect before.* The same point is recognised as law in *Com. Dig. Parliament*, (C. 23,) and *Hale on Parliament*, 36, and in Bacon's *Abr. Stat. A.* It seems, therefore, a settled doctrine, that a statute takes effect from the time of its passage, and needs no promulgation to give it operation.

'Against principles thus solemnly adjudged, I cannot find a single opposing authority.' 1 *Gallison's Reports*, p. 66. *The Brig Ann.*

The opponents of the common law would undoubtedly cite these as admirable cases in support of their arguments against it. But the difficulty is, we repeat it, such variances cannot be prevented. New and unimagined questions are for ever arising. While we are codifying one body of principles, which are settled to be law by our courts of judicature, and have passed into the books of digested law, and which therefore did not need codifying, others, unprovided for, are brought before the court at every hour of its session. The remedy comes too late. It is here where the celebrated framers of codes are under the most egregious mistake. They think they have made everything clear and simple, and provided for all possible contingencies, which can arise in the various applications of the law. Justinian believed this of his system. It was not to be imagined, he thought, that anything could be wanting in his immense body of laws, when he first enacted and promulgated them to the Roman people. All the embarrassments and mischiefs, necessarily arising from the various and doubtful significations of words, were ascribed by him to the chicanery of lawyers; and he denounced the punishment for forgery against those 'rash civilians,' who should dare to *interpret* his will. Yet Justinian very soon saw fit to change his mind. The historian Procopius tells us, according to Gibbon, that on each and every day during his long reign, he introduced and promulgated some legal innovation. Napoleon was in a similar error, and as speedily renounced it. 'I at first fancied,' said he to Las Casas, 'that it would be possible to reduce all laws to clear, simple, geometrical propositions, so that every man who could read and connect two ideas together, would be able to decide for himself; but I became convinced, almost immediately after, *that this idea was absurd.*' The truth is, we cannot foresee the growing want of legal remedies; and some common or unwritten law is therefore in every state unavoidable. We once had occasion to illustrate this by the numerous litigated questions which have arisen under the statute of Frauds, a statute penned by the ablest judges and civilians that England ever produced.

In the foregoing remarks, when we have spoken in praise of the common law, we have referred not to the pure, unmingled

common law, where there is no statutory provision to guide or control it. There are comparatively few decisions of this character in our modern books of reports. The common law indeed naturally grows, and becomes more extensive as we advance. It accompanies us at every step of our progress in the reading of statutes, decrees, and decisions, which lie nominally beyond its reach. For the principles of interpretation and practice are borrowed from it in every branch and department of jurisprudence; and scarcely a question of litigated right can arise in any of our courts of justice, without in some way calling for its aid, or receiving from it light. So that the more other laws multiply, the more the common law also advances. As the sole means of improving it, we insist on able reports of well investigated cases; and we mean to make our remark particularly applicable to those of the Circuit Courts of the United States, because those are now very much neglected.

And yet there is much complaint of the great number and of the rapid multiplication of law reports. The gentleman of the bar is now under the necessity of enlarging his library and extending his researches far and wide, for the purpose of seeing all that has been decided or said by eminent jurists on the various questions submitted to him in the course of his practice. But can this be to any one a fair ground of complaint? Is it not, on the contrary, to be regarded with feelings of unmingled satisfaction? Does it not indicate clearly the increasing demand, and the more general diffusion of intelligence, on a subject, of all others the most important to the peace and good order of society? The publication of such reports is the promulgation of the laws. They are promulgated, too, with the principles on which they are founded. In no other way is it possible to make them generally known; and as they arise out of the actual demands for justice, they are likely to be peculiarly well suited to the existing wants and condition of society.

We consider the prompt and full publication of law reports, to be, for a variety of other reasons than those we have mentioned, highly beneficial. Of the importance of it to our personal rights we cannot form too great an estimate. It secures the judiciary, by every possible motive, to the faithful administration of justice. What wrongs from this source may we not look for, in a community where the decrees of the courts of judicature are suppressed and kept from public view? Judges, who act under the impression that such is to be the

fate of their decisions, although they feel the sense of duty in all its purity, yet want the consciousness of being narrowly and extensively observed, which is a powerful incentive to great and generous efforts, even among the most elevated minds. But when they know, that their opinions may be severely scrutinized by the ablest men of their own, and perhaps of coming ages; when they reflect that those opinions will be either made the basis of farther adjudications, or rejected as inconclusive and false; above all, when from fear of error they are led, as in this country they almost universally are, to write their opinions at length, and themselves prepare them for the press, they have every inducement, interested and disinterested, which can possibly be crowded upon the mind, to be laborious, accurate, and impartial. Let then our legal decisions be brought, as extensively as may be, before the public; for nothing can tend more unerringly to the faithful administration of justice. If we mistake not, this is not yet estimated as it ought to be.

True it is, the great and increasing number of the volumes of which we are speaking, makes it expensive to purchase, and laborious to read them through. But this is a difficulty attending the advancement of all the sciences. New treatises are published. The results of new investigations must be laid before the public. New discoveries and inventions, or new improvements or adaptations of the old ones, are continually soliciting our examination. Yet the man of real science does not very often complain of the multiplication of books upon his favorite theme; nor the man of letters, of the numerous works of literature and taste. The comparison furnishes us with a good illustration of the true character of the common law. It is a science, and, like all other sciences, progressive. It perpetually enlarges, and suits itself more and more closely to our wants and circumstances. And one may as well think of composing a system of natural philosophy, which shall be perfect, and without the possibility of further improvement, as a code of laws, to which advancing society is to be chained. It is not necessary to read all the law reports which are published, any more than it is to read all the essays on experimental subjects in natural philosophy, which are published. There are accurate digests of the one, as there are accurate digests of the other. Competition, too, does its mighty work of improvement here, as everywhere else. The valuable volumes of

which we are speaking, soon rise to their proper elevation; the poor ones as soon sink into insignificance. The instances of this, in the history of these publications, are so many and obvious, that it is not necessary to name them particularly.

It is thus, by the publication of these volumes of reports, that the Common Law, like all the other sciences, is destined perpetually to improve. The system is becoming better, as well as more generally known. On the hearing of a question in controversy, the object is looked upon from every possible point of view. All the various and seemingly conflicting decisions upon the subject, are brought before the court and canvassed. The postulates and arguments on which they rest, are severely scrutinized; the valuable truths selected, and the material errors discarded, from each. And there is every reason for believing, that by this mode of proceeding, the really sound principles of law will inevitably be reached at last. This is precisely the way by which all the sciences improve; and it is the only way which our courts of judicature can take on the settlement of a litigated question.

We wish also to see some books of reports put earlier into the hands of youth for their legal education, than they have been hitherto. It appears to us, that they should soon be taught to read them in the order in which they are published. If we are not greatly mistaken, they would, with proper facilities for their explanation, find them far more interesting and instructive to read, and infinitely more easy to remember, than codes, or digests, or elementary treatises. We believe these last to be commonly too abstract and general, and best suited to the minds of those, who are somewhat advanced in the science of the law. We know that the young pupil often grows tired of them, because he does not always easily or fully comprehend them, and, even if he does, cannot long retain them accurately in his memory. When afterwards, in the course of his professional practice, he is called upon to make an application of the knowledge which he has thus gone over, he finds that he has forgotten it; and when he recurs again to his books for the lost intelligence, it often appears new to him, and in nine difficult questions out of ten, he would not remember that he had ever seen it before. Not so, however, with that acquired by reading interesting law reports. The facts in these cases serve as bonds of association, by which the principles interwoven with them are held together, and kept long and strongly fas-

tened in the mind. We appeal to the most learned of the profession, if this, even with them, is not sometimes apt to be so. The nice distinctions and the subtle refinements in their elaborate volumes of digested jurisprudence, which they have cause of recollecting only as they have read them, may pass from their thoughts; but let them be connected with some cases of actual occurrence, in which they were engaged, or which they may have been called upon carefully to examine, and they do not forget the principles then. It is also to be borne in mind, that digests and elementary treatises are only the abstracts of adjudicated cases, and not always sure therefore of stating accurately the points decided. In fact, experienced counsel will never, in a case of importance, trust to a short sentence, which, the laborious compiler says, contains in an abbreviated form the principles of a question settled, when they have the original case itself within their reach; for they have learned by observation the errors and the imperfections of digests. These are excellent as indices or tables of reference. Seldom, however, are they to be relied upon as absolute authority in themselves, when it is easy to procure the books of reports from which they were at first taken. Thus it is that the student, so far as he can read reported decisions intelligently, is sure of learning his law more accurately, as well as more pleasantly, than he can in any other way. He thus, too, will learn the questions of practice; the various forms of action; the manner in which rights are to be ascertained and settled. He sees the remedy at the same moment that he sees the wrong; and if he reads the books of reports as rapidly as they appear, and in the same order, he will be likely to know what is actually going on professionally in the world around him, from which he is almost entirely separated in the common course of early legal education.

Many of our readers may think us enthusiastic in our estimate of the importance of reported decisions, and of the various and extensive uses to which they are actually subservient. In support, therefore, of some of our last remarks, we shall cite here another eloquent passage from the writings of the admirable Commentator on American law. It is in every way just; and nothing can be more practically applicable to the lessons of the student. We only wonder, that reflections, such as these, did not lead their distinguished author to apply them, more particularly than he has done, to the

great purpose, which we have designated in the foregoing paragraph.

'They [the Reports] are worthy of being studied even by scholars of taste and general literature, as being authentic memorials of the business and manners of the age in which they were composed. Law reports are dramatic in their plan and structure. They abound in pathetic incident, and displays of deep feeling. They are faithful records of those "little competitions, factions, and debates of mankind," that fill up the principal drama of human life; and which are engendered by the love of power, the appetite for wealth, the allurements of pleasure, the delusions of self-interest, the melancholy perversion of talent, and the machinations of fraud. They give the skilful debates at the bar, and the elaborate opinions on the bench, delivered with the authority of oracular wisdom. They become deeply interesting, because they contain true portraits of the talents and learning of the sages of the law.'

'Every person well acquainted with the contents of the English reports, must have been struck with the unbending integrity and lofty morals with which the courts were inspired. I do not know where we could resort, among all the volumes of human composition, to find more constant, more tranquil, and more sublime manifestations of the intrepidity of conscious rectitude. If we were to go back to the iron times of the Tudors, and follow judicial history down from the first page in Dyer to the last page of the last reporter, we should find the higher courts of civil judicature, generally, and with rare exceptions, presenting the image of the sanctity of a temple, where truth and justice seem to be enthroned and to be personified in their decrees.' *Kent's Commentaries*, pp. 462, 463.

'A still deeper interest must be felt by the American lawyer in the perusal of the judicial decisions of his own country. Our American reports contain an exposition of the common law as received and modified in reference to the genius of our institutions. By that law we are governed and protected, and it cannot but awaken a correspondent attachment.' *Ibid.* p. 455.

If the foregoing remarks are true of the publication of law reports generally, with what peculiar force do they apply to those of the national courts of the United States? It appears to us, that these must be interesting, not merely to the professional man and the jurist, but to every one who wishes to see clearly the true character of our political institutions. We know in fact, that there is no other way of acquiring a knowledge of them with any degree of accuracy. The constitution of the courts of which we are speaking, is entirely unexampled in the history of states.

We believe indeed that it forms the only characteristic feature, which is purely and exclusively our own, in the whole frame of our national government. All our other civil institutions have been partially borrowed from abroad, and are at least faintly imitated by foreign states. But the nature of the jurisdiction, and the supreme political ascendency of our national courts of judicature, have neither precedent nor parallel in any country or age.

It had long been a favorite maxim, among enthusiastic writers on the true nature of political rights, that officers of government are but the delegated agents of the people; subservient to them; bound to give them an account of their stewardship; with clearly defined duties; with restricted powers; not authorized, under any pretence, to overstep the strict limits prescribed to them; and liable to have their doings abrogated and held for nought, when they do. The world were inclined to look upon this as rather a Utopian vision in some fancied organization of civil society, than as a practicable principle in government. In ours, however, we have actually realized it. Our high courts of judicature have carried it into execution, and we are now witnessing their powerful influence over our political character, in the protection which they give to individual rights against the encroachments of the legislative and executive powers combined. It is not merely their humble duty to administer justice between man and man. They have a far more elevated one intrusted to them. In the vast machinery of our national affairs, they are, as it were, the regulators. All our great public functionaries, even Congress itself, as well as the legislatures of the several states, they hold in salutary check. Between the people and their delegated agents they stand the supreme umpire. To these they say, 'Your power of attorney is the constitution; keep you within the limits prescribed to you by that; for when you transgress them, we are bound by our high political principles, as well as by our sacred oaths of duty, to set your doings aside, and hold them for violations of right.' Is there anything comparable to this in the civil constitutions of foreign states? There the courts of judicature hold a subordinate rank in their various frames of government, and over them the legislative and the executive powers have the superintendence and control. Here they are supreme, and exhibit before us continually, in actual practice, as well as in beautiful theory, the absolute sovereignty of the law.

For the discharge of duties of such unexampled importance, the courts of which we are speaking are necessarily clothed with the most extraordinary powers. They have ultimately the power of defining their own powers; of drawing the line of demarkation between the rights of the several states and those of the Union; between the jurisdiction of the various superior courts belonging to the former, and their own; and of construing, and interpreting, and applying the provisions of the constitution, in such a manner as to their wisdom shall seem equitable and meet, for the purpose of promptly effectuating all the high purposes of national justice, for which it was originally designed. Should not the official doings of such a body of men be promptly and extensively made known? It appears to us, that the publication of the reports of adjudicated cases, from sources and on subjects like these, ought to receive, most liberally, legislative patronage and support, and be diffused as far and wide as possible, throughout our community. If there be any intelligence important to the freedom of our political institutions, it is this.

In the foregoing paragraphs we have referred only to the great questions of constitutional law which come before our national courts of judicature. The discussion of the simpler ones, occurring to them in the ordinary course of their jurisdiction, are also full of interesting matter to gentlemen of the profession. They are often called upon to decree and act on the law of nature and of nations. In many cases, they introduce us to a knowledge of the peculiar local laws of foreign states, as well as of the great international law which connects them all together. They bring also into some practice the civil law, and tend to diffuse a knowledge of it, and gradually to reconcile and incorporate it with our own, and thus give us the use of some of its admirable principles. We ask our readers to consider the cases of frequent occurrence before the courts of which we speak, for the evidence of what we have said. The examination of wrongs committed upon the high seas, or of crimes in any way affecting our sovereignty as a nation; of revenue and exchequer cases; of questions of admiralty and prize; of all those coming from the various laws of navigation and trade; of the vested or the violated rights arising under the stipulations of a treaty; of the infractions of the privileges of a patent, or of the sacred security of property contained in the published works of men of literature and science; of the

great maritime contracts, growing out of our extended commercial connexions with foreign states, and requiring for their elucidation the great code of mercantile law, now by common consent in force, almost all over the enlightened world ;—the examination of these, we say, has called forth in this country, to a very honorable extent, learning, research, and ingenuity, and furnished a rich variety of fruitful themes for valuable disquisitions, on the most important and interesting points of law ; and, for the reason we have already given, the publication of just reports of them must be exceedingly useful in extending the knowledge of that law, and making it more accurate and clear, as well as more generally known.

May we not also look to the publication of the reports of which we are speaking, for making the common law of our country more regular and uniform in its character, than it has been hitherto ? The several courts of the various states are separate and independent of each other. The decisions in one are not considered as having any obligatory force in those of another. Hence it is that they are often at variance and sometimes diametrically opposite. But the courts of the Union are joined. A most powerful bond of association connects them together. The decrees and doings of one would be considered as having something of more influence on those of another, than the mere opinions of learned and intelligent men. They go moreover into every part of the Union, and gather intelligence from the most gifted and eminent counsel of our country, and come together annually for the purpose of hearing, and conferring, and disposing of litigated rights, under circumstances peculiarly favorable to the clear and correct settlement of the law. No party feelings nor sectional views can sway them. Those of one must offset and counterbalance those of another. Their errors are reciprocally corrected. By a judiciary thus composed of the ablest judges, and acting under such advantages, the true principles of justice must be reached, if they are within the reach of human genius. Singly as well as collectively, we say, they may do much to place our common law on a more steady and regular foundation, than it now has. At least, so far as their influence goes, it may be rescued from that inconsistency and variance for which it has been so long and so deservedly reproached.

Is it not therefore to be regretted that the reports of cases adjudged in the courts of which we are now speaking, should be

so much neglected as they are? Questions of much moment, as we have seen, are constantly brought before them; and far the greater number of their important decisions are final; yet there is no provision made by law for their encouragement and support. While those of the various superior courts of the several states are brought forward under the avowed patronage of their respective legislatures, and ordered to be circulated throughout the community, those to which we now refer are left to struggle their own way into being, unaided, but by their own intrinsic merit. With the former, therefore, they can hold no fair competition in popular favor or notice. Indeed, when they are published, it is usually, as in the present instance, in consequence of the generous efforts of some enterprising young member of the bar, who, desirous of becoming versed in the learning and practice of the highest branches of jurisprudence, and seeing clearly the importance of the adjudications before him, records them and gives them to the public, though sometimes, we fear, at no little pecuniary sacrifice of his own. What must be the natural consequence of such neglect as this? Why, the reports of the cases settled in these courts are comparatively few in number; on some of the circuits they are not published at all; and on those where they are so in general, they appear irregularly and without any system. The publication of the present volume contains a remarkable illustration of this fact. It is intended to report the decisions upon a circuit, where very numerous and very important questions must arise. During the whole time which it covers, two of the brightest ornaments of the profession were upon the bench; and yet all the decisions which were gathered from the court, from the year 1810 to the year 1824 inclusive, are comprised in this single volume.

We have no room now to speak as we could wish and as we intended, of the particular merits of this collection of cases. Mr Paine is a judicious and a very able reporter. It is a sufficient recommendation of the volume, that it is filled almost entirely with the written opinions of Judges Livingston and Thompson; for the facts in the cases, and the arguments of counsel are stated very succinctly, and yet very clearly and satisfactorily, and the book therefore is encumbered with no useless or extraneous matter. Judge Thompson is still upon the bench. Many years of his very laborious public life have been spent in the discharge of the highest judicial duties, in the

courts of his own state as well as in those of the Union, and, we feel assured, to the great satisfaction of those who have fallen under his administration. In his knowledge and application of the common law, which is our favorite theme at present, we know him to be peculiarly accurate and unexceptionable. It is hardly proper for us, however, to dwell longer upon his judicial character now. But we hope to see more of it hereafter in the same manner in which this volume presents it to us.

In the death of Judge Livingston, the American public sustained an irreparable loss. As the volume before us contains the latest of his published judicial labors, it affords us a favorable opportunity, which we have long sought for, and which we now gladly embrace, of offering to our readers some slight sketches of his life and general character. The private as well as the public virtues of such a man ought to be made known and recorded.

The father of Judge Livingston was Governor William Livingston, of New Jersey, a distinguished lawyer and a revolutionary patriot, whose memoirs and a sketch of whose character may be found in Allen's Biographical Dictionary.

Judge Livingston was born on the twenty-fifth of November, 1757, and died at Washington on the 23d of March, 1823. His literary education he received at the College in Princeton. In the revolutionary war he served with distinction, and was aid-de-camp to General Arnold, at the battle of Saratoga, and indeed in the defeat and capture of Burgoyne's army. After this he studied law, and was a contemporary at the bar with General Hamilton, Mr Harrison, Judge Benson, Mr Troup, Mr Burr, and others, all of whom were very eminent lawyers. As an advocate his rank was among the highest. In fact, his talents were always thought more peculiarly adapted to the bar than to judicial duties. In his temperament he was very ardent and earnest, so that he was hurried on by the most implicit confidence in his client's cause, and identified himself in devotedness with all his views, and felt an interest in his success almost as if the cause were his own. The same traits of intellectual character sometimes marked his decisions from the bench. Boldness and rapidity of thought, and energy of mind and feeling, always accompanied them. On these occasions he was luminous and striking, far beyond the originality of the counsel in the case, the most eminent of whom were left behind him in the reasons given on their side of the question, when the judge decided in their favor.

We said, these pages show Judge Livingston to have been a scholar and a man of letters. And from a variety of other sources we understand this to have been remarkably the case. In the early part of his professional career, he stole many an hour from the forum, and from the severer studies of the law, and even from the nobler sciences of national and general jurisprudence, and gave them to the works of fine literature and taste. Of the ancient classics he was particularly fond. To the latest period of his life he read them with the greatest ease and delight. We understand that he never travelled on his long, laborious law circuits without taking some one of them as a cheering companion upon his journey. Most people would have said, that every moment of his time, which the pressing calls of duty on the bench did not extort from him, must be given to relaxation and repose. And so in fact it was with him. For to such minds as his, literature becomes, as it always ought to be, nothing but relaxation and repose. It is not surprising therefore, as has been well remarked, that he possessed a most copious and chaste and elegant diction.

The eloquence of Judge Livingston was fervid, impressive, masculine, and persuasive ; his power of research uncommon ; his zeal untiring ; and his command of illustrative topics most rapid and comprehensive. He had a very powerful influence therefore with juries. On these occasions, indeed, he was always truly delightful ; for with all his ardor, he mingled a delicacy and courtesy, a courage and constancy, a facility of changing his ground and returning to the charge, after defeat or discomfiture, which surprised and sometimes astonished his audience.

In the modern languages, too, Judge Livingston was an accomplished scholar. By his travels and his early residence in Europe, he learnt to speak the French and Spanish with as much fluency as his native tongue. His manners were uncommonly winning. In his general deportment he was affable, buoyant in spirit, and gentle to a most remarkable degree, unless roused by severe provocation.

We are told that he was full of candor and kindness ; of a liberal and benevolent spirit, an enlarged charity, a disposition to aid the humble and the oppressed ; and that he was a steady and bold asserter of the principles of civil and religious liberty. In the general diffusion of intelligence, he took an active interest. He aided the public schools personally ; and for

the purpose of improving and extending their good influences, he often wrote communications in the papers of the day. As a father and as a friend, he was admirable, and won the affections of all who knew him. As a political opponent, no one was more inflexible, but at the same time, no one was more kind to his adversaries.

These traits in the character of Judge Livingston, we have obtained from those, who were long and intimately acquainted with him ; and we were again and again assured, that we could not over-estimate his merits. In further illustration of them we shall conclude with the following extracts from a very able obituary notice, which was published at New York, immediately after his decease.*

'His judicial character is, of course, the most interesting to the public, and as a Judge, his character was very peculiar and strongly marked. He was eminently a man of genius, of strong, vivid, and rapid perceptions, and the frankness of his character always prompted the immediate impression of his convictions. Such a disposition and habit must of course, and not unfrequently, induce mistakes. But here intervened a redeeming principle resulting from one of the most peculiar characteristics of his happily composed nature. For a man of strong and ardent genius, and profound learning, and these too rendered conspicuous by great reputation and high office, Judge Livingston was in one respect, almost a miracle. *He seemed to be without vanity.* He did not listen, or affect to listen, to arguments in opposition to his declared opinions merely from official decorum, but his mind was literally and truly open to conviction. Others may have committed fewer errors, but who has left fewer unrepaired ?

* Livingston was appointed Judge of the Supreme Court of New York, in January, 1802, and of the Supreme Court of the United States, as the successor of Mr Justice Patterson, in December, 1806.

He was buried under Wall Street Church, in the city of New York ; and in the church itself is the following inscription, written by a friend at the request of his family.

M. S.
Brockholst Livingston,
Sup. Cur. Fœd. Reip. Jurid.
Qui
Peracuto ingenio præditus,
Eloquentiâ tum suavi, tum splendidâ ornatus,
Omni juris et literarum scientiâ præstans,
Obiit Washingtoniæ,
Multis bonis carissimus, multis flebilis,
Martii XXIII. A. D. MDCCCXXIII.
Ætatis suæ LXVI.
Liberi ejus mœrentes hoc monumentum
Posuêre.

'The kindness and suavity of his character were strongly displayed in the discharge of his official duties. At every moment of his life, he was an amiable and a finished gentleman. He never manifested anything of the petulance or insolence of station. He ever seemed to be of opinion, that there was a dignity in the administration of justice, which reached even to its inferior ministers; and without ever forgetting the propriety of his station, he treated the gentlemen of the bar as his friends and brethren, over whom he was called, as it were, to preside for some temporary purpose.

'To say that he was just and impartial, would be low and inadequate praise. He was prompt, laborious, and indefatigable. His own ease and pleasure always gave way at the call of duty. He never delayed or slighted anything. He often labored most without the stimulus of fame. He was, perhaps, rather too averse to the parade of display and publication. Causes were not unfrequently heard at his own house, and many of his most elaborate opinions, the result of laborious and profound investigation, were communicated only to the counsel interested.'

'In all the relations of domestic life—and it is there that a man's true character is best known, and its influence—he was far above the reach of commonplace commendation. None but those who saw him in retirement and knew him intimately, can appreciate his character in this respect. He was ever most affectionate, attentive, and considerate, exacting little for himself, and always consulting the interests and feeling of his family. The main object of his life, at least that which seemed to interest him most, was to transfuse his own knowledge and character into the minds of his children. Every hour that could be spared from his public duties, and more than could well be spared from the time necessary for his relaxation and the care of his health, was devoted to their education.'

ART. X.—*Elements of Geometry*, by A. M. LEGENDRE, Member of the Institute and the Legion of Honor, of the Royal Society of London, &c. Translated from the French for the use of the Students of the University at Cambridge, New England, by JOHN FARRAR, Professor of Mathematics and Natural Philosophy. Second Edition, corrected and enlarged. Printed by Hilliard and Metcalf, at the Univ. Press, Cambridge, N. E. 1825. 8vo. pp. 224.

THOSE who are fond of reconciling apparent contradictions in national character, may find amusement in attempting to